GOVERNMENT OF MALAYSIA

v.

CHIA KEE TEE

HIGH COURT MALAYA, MALACCA
WAN YAHYA J
[CIVIL SUIT NO. 21- 169 OF 1984]
16 AUGUST 1988

REVENUE LAW: *Income Tax - Whether Director General of Income Tax has power to impose taxes on the appellant over the period of 13 years - Whether claim by Income Tax statute barred - Whether limitation period applicable to Government.*

The defendant/appellant raised the sole issue in the appeal as to whether the Director General of Income Tax has power to impose additional taxes on the appellant over a period of 13 years. The appellant contended that by virtue of s. 91 of the Income Tax Act the Tax Department was precluded from enforcing any claim extending over the period of 12 years i.e., claims which are statute barred.

Held:

[1] It is clear that by virtue of s. 33 of Limitation Ordinance 1953 that limitation will not apply to any proceedings by the Government for the recovery of tax.

[2] The word "may" in s. 91 of the Income Tax Act denotes a permissive rather than a restrictive authority to the Director General of Income Tax to impose taxes within 12 years to bring it within the purview of the Limitation Ordinance 1953 and consequently reading s. 91(1) of the Income Tax Act together with s. 33 of the Limitation Ordinance would enable the revenue to recover taxes beyond the 12 years period.

[Appeal dismissed with costs.]

Case referred to:
Arumugam Pillai v. Govt. of Malaysia [1976] 2 MLJ 72

Legislation referred to:
Income Tax Act 1967, ss.2, 91, (1), 101(2)
Limitation Ordinance 1953, s. 33

For the appellant/defendant - Rashid Ali; M/s. Rashid Ali Co.
For the plaintiff - Abd. Karim b. Abd. Jalil

JUDGMENT

Wan Yahya J:

The singular issue raised in this appeal is on the authority of the Director General of Income Tax to impose additional taxes on the appellant extending over the period of 13 years. Counsel for the appellant reading s. 91 of the Act contends that the provisions therein would in effect preclude enforcement by the Tax Department for any claim extending over the period of 12 years or in other words claims which are statute barred.

Sub-section (1) of s. 91 on which Counsel based his argument reads:

> (1) The Director General, where for any year of assessment it appears to him that no or no sufficient assessment has been made on a person chargeable to tax, may in that year or within twelve years after its expiration make an assessment or additional assessment, as the case may be, in respect of that person in the amount or additional amount of chargeable income and tax or in the additional amount of tax in which, according to the best of the Director General's judgment, the assessment with respect to that person ought to have been made for that year.
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> (2) Where the Director General discovers that the whole or part of any tax repaid to a person (otherwise than in consequence of an agreement come to with respect to an assessment pursuant to s. 101(2) or in consequence of an assessment having been determined on appeal) has been repaid by mistake whether of fact or law, the Director General may take an assessment in respect of that person in the amount of that tax or that part of that tax, as the case may be:
>
> Provided that no such assessment shall be made:
>
> (a) if the repayment was in fact made on the basis of, or in accordance with, the practice of the Director General generally prevailing at the time when the repayment was made; or
>
> (b) in respect of any tax, more than twelve years after the tax has been repaid.
>
> (3) The Director General where it appears to him that:
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> (a) any form of fraud or wilful default has been committed by or on behalf of any person; or
>
> (b) any person has been negligent,
>
> in connection with or in relation to tax, may at any time make an assessment in respect of that person for any year of assessment for the purpose of making good any loss of tax attributable to the fraud, wilful default or negligence in question.

The above section however has to be read together with s. 33 of the Limitation Ordinance 1953 which *inter alia* provides that limitation will not apply to any proceedings by the Government for the recovery of tax.

In my interpretation the word 'may' in s. 91 of the Income Tax Act denotes a permissive rather than restrictive authority to the Director General to impose taxes within 12 years and the period of 12 years was specified in order to bring it within the purview of the Limitation Ordinance 1953. Consequently s. 91(1) of the Income Tax Act concomitantly read with s. 33 of the Limitation Ordinance would enable the revenue to recover taxes beyond the 12 years period. Reading these sections as a whole I am of the view that s. 91(1) is permissive in nature and therefore not intended to be a limitation, the period of 12 years mentioned therein having been rendered irrelevant by the proviso to s. 33 of the Limitation Ordinance.

This is the view taken by the Federal Court in the case of *Arumugam Pillai v. Govt of Malaysia* [1976] 2 MLJ 72, in particular at p. 73 where Gill CJ said:

> In our judgment limitation as such does not apply to any proceedings by the Government for the recovery of any tax. This would seem clear from the proviso to s. 33(1) of the Limitation Ordinance 1953. Reading s. 91 of the Income Tax Act 1967 as a whole it would seem clear that, quite apart from any form of fraud, the words 'within twelve years after its expiration' are irrelevant where there has been any wilful default on the part of a taxpayer in disclosing part of his income for any particular year of assessment.

Even if my interpretation of the above is wrong and the 12 year period in s. 91(1) is intended to be a limitation period, I would nevertheless hold that the revenue action can go beyond this period if it could be established that fraud or wilful default has been committed by or on behalf of any person or that person has been negligent. Although para. 7 of the statement of claim by the revenue alleges that the plaintiff had neglected to pay the tax, the defendant had not refuted this allegation. The Director General is therefore authorised to make the assessment (which is defined in s. 2 of the Act to include additional assessment) for the year dating back to 1968.

I therefore dismiss this appeal with costs.

Also found at [1989] 1 CLJ 209